PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

AGENCY.

Contract for Personal Services

B, a manufacturers' and packers' agent, entered into a contract with A, a manufacturer of gelatine, whereby it was provided that A should use his best efforts to push the sale of B's gelatine throughout the United States; that A should not sell any gelatine of persons other than B; that B should keep A as his sole agent for the period of five years; that B should receive a percentage on all sales as his only compensation; and that he should receive an additional percentage for collecting unpaid bills. On the death of A, B had a large quantity of gelatine on his hands, and the question was whether the contract was terminated by A's death.

The Supreme Court of Massachusetts held that it was of such a nature as to admit only of personal performance; that the contract on B's part was one merely of agency; that it contemplated only the personal services of the agent, B, under the personal supervision of the master, A, and therefore it ended on A's death, by virtue of the familiar law of agency, that a contract of agency terminates on the death of the principal. A's executor was therefore entitled to recover the unsold gelatine in B's hands: *Brown* v. *Cushman*, 53 N. E. 861.

ATTORNEY AND CLIENT.

Contingent Fees, Champerty

While a contract for a contingent fee will be upheld in Illinois, yet the attorneys should be wary of entering into such agreements when one of the conditions is that the attorney shall bear the expenses of the suit. A client assigned a third of his claim to each of two attorneys, A and B, in consideration of their legal services; and one of the conditions of the agreement was that A should bear the expenses of the suit. In an action by A and B against the client for their proportionate parts of the judgment

ATTORNEY AND CLIENT (Continued).

obtained, it was held that while an attorney may contract for a contingent fee, yet in this case the agreement of A to bear the expenses rendered his claim champertous, and further, since the undertakings of A and B were dependent, and could not be separated from each other, A's promise vitiated the whole contract, and neither A nor B could recover: *Geer et al.* v. *Frank et al.*, 53 N. E. (Ill.) 965.

BILLS AND NOTES.

It seems remarkable that a case was carried to the Court of Appeals of New York, to have that court affirm a decision of the Supreme Court to the effect that an indorser of a note, when sued by a subsequent indorsee taking the note for value before maturity and without notice, cannot set up as a defence that the name of the maker was forged, and that he was unaware of the fact when he indorsed it: *Lennon* v. *Grauer*, 54 N. E. 11.

Indorser, Forgery of Maker's Name

CARRIERS.

There have been various decisions of courts as to the right of a railroad to give the exclusive right of carrying passengers and baggage to and from its station to a single transfer company, which alone might enter its grounds for that purpose. The Supreme Court of Indiana, in *Indianapolis Rwy. Co.* v. *Dolin*, 53 N. E. 937, has decided that such a regulation is beyond the power of the company and void. The court said that while a railroad has undoubted power to make regulations for the use of its grounds, yet the term "regulations" implies uniformity in operation, and not discrimination. Since the land was acquired under the power of eminent domain, it must be used for the benefit of the public, and the grant of a monopoly to a single transfer company was not such a public use as justified the holding of the land by the railroad.

Privilege to Hackmen of Soliciting Business

CONSTITUTIONAL LAW.

The Supreme Court of Massachusetts, in *In Re Brown*, 53 N. E. 998, has upheld the validity of a statute (St. 1898, c. 549), providing that in proceedings had in any police district or municipal court in which the judgment debtor resides, when proof is furnished that the debt is for necessaries furnished, a decree may be made fixing the time and place of pay-

Statute Preferring the Claims of Certain Creditors

CONSTITUTIONAL LAW (Continued).

ment, a non-compliance with which shall enable the court to summon the debtor for contempt.

The law was assailed, *inter alia*, as a violation of the fourteenth amendment, in that it denied the equal protection of the laws to all, since it applied only to persons within the jurisdiction of the above-mentioned courts. But the court sustained it on the ground that it was a municipal regulation, based simply on the necessities of administration in dealing with a population unequally distributed over the state; citing *Missouri* v. *Lewis*, 101 U. S. 22; *R. R. Tax Cases*, 115 U. S. 321, and *Hayes v. Missouri*, 120 U. S. 68.

Requirement to Pay Discharged Servants, Fourteenth Amendment

The legislature of Arkansas passed a statute (Acts, 1889, p. 76), providing that when any person or corporation engaged in the railroad business should discharge with or without cause any servant or employe, the unpaid wages of such servant should become due and payable at the contract rate without reduction, and in case of failure to pay such wages, they should, as a penalty, continue at the same rate until paid. The statute was attacked as a violation of the fourteenth amendment in its application to railroad companies chartered prior to 1889. In *St. Louis, etc., R. Co.* v. *Paul*, 19 Sup. Ct. 419, its constitutionality was sustained by the Supreme Court of Arkansas (64 Ark. 83), and on appeal to the Supreme Court of the United States the decision was affirmed.

The opinion of the court, delivered by Chief Justice Fuller, is based largely on Art. 12, § 6, of the Constitution of Arkansas, providing for the alteration, amendment and repeal of the charters of corporations, and while it admits the soundness of the argument of the *Sinking Fund Cases*, 99 U. S. 700, that the power to amend cannot be used "to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits, actually acquired, of contracts lawfully made," yet the present statute is said to be fair and reasonable as a regulation of the business of railways, and easily sustainable under the police power.

The case of *Rwy. Co.* v. *Ellis*, 165 U. S. 150, in which the Supreme Court declared void a statute of Arkansas which provided for a recovery of an attorney's fee of $10 from railroad companies for failure to pay certain debts, was distinguished on the ground that it was an arbitrary regulation which imposed a special burden on railway companies for no

CONSTITUTIONAL LAW (Continued).

cause whatever, and was not directed toward a reform of abuses specially applicable to railroads, but it was one which would be equally appropriate for all debtors.

Statute Requiring the Sale of 1000-Mile Railway Tickets

An excellent contrast to the preceding case is that of *Lake Shore, etc., Rwy. Co.* v. *Smith*, 19 Sup. Ct. 565. Here the legislature of Michigan, which had previously passed a statute fixing the maximum railroad rate in Michigan, provided that the railroads in that state should issue 1000-mile tickets for a certain price.

The Supreme Court of the United States defeated an attempt to justify this act on the reserved power of amendment and repeal of corporate charters, and held it to be a violation of the fourteenth amendment, Fuller, C. J., and Gray and McKenna, JJ., dissenting. As Justice Peckham, who delivered the opinion, said: It was a provision for a discrimination, "an exception in favor of those who desire and are able to purchase tickets at what might be called wholesale rates; a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule." The Supreme Court does not seem to favor an extension of the police power in favor of a particular class of persons, especially when the result of such a law would probably be to cause the rest of the community to bear a greater burden, for the railroads would probably, directly or indirectly, take from the general public whatever they would be forced to lose on a special sale of tickets at a specified price.

Attorneys' Fees to be Paid by Railroads in Damage Suits

The Supreme Court of the United States has recently affirmed the constitutionality of a Kansas statute (Laws, 1885, p. 258, c. 155, §§ 1, 2), providing that when a suit is brought against a railroad company for damage by fire caused by negligence in the operation of its trains, the company is required to pay a reasonable attorney's fee to the successful plaintiff. The law, in the opinion of Brewer, J., is a reasonable police regulation and not violative of the fourteenth amendment: *Atchison Rwy.* v. *Matthews*, 19 Sup. Ct. 608.

Harlan, J., with whom concurred Brown, Peckham and McKenna, JJ., delivered a vigorous dissenting opinion, in which he characterized the law as an unwarranted discrimination

CONSTITUTIONAL LAW (Continued).

against railroads, imposing a penalty upon them from which all other suitors are free, and depriving them of the equal protection of the laws.

This case is only one of the many which show how evenly divided is the Supreme Court on questions of this kind; and it would seem that it will be some time yet before the scope of the fourteenth amendment, as affected by the states' police power, is clearly defined.

Habitual Criminal Act

The Supreme Court of Massachusetts has upheld the constitutionality of an habitual criminal act providing that whoever should have been twice convicted of crime and imprisoned for more than three years, should, on being convicted of another crime, be sentenced to an imprisonment of twenty-five years. The law was attacked: (1) as an *ex post facto* law in relation to cases where the first two crimes were committed before its passage; (2) as a "cruel and unusual punishment; (3) as a deprivation of liberty without due process of law. The court overruled all these objections, chiefly relying on *In Re Kemmler*, 136 U. S. 436, for the second one. It seems remarkable that the court was again obliged to reiterate the rule that the bill of rights contained in the first ten amendments to the Constitution of the United States has nothing whatever to do with action by the states: *McDonald* v. *Comm.*, 53 N. E. 874.

DAMAGES.

Excessive Damages, Negligence of Railroad

In *Cleveland, Etc., Rwy. Co.* v. *Quillen*, 53 N. E. 1024, it appeared that plaintiff, who was a passenger on the defendant railroad, was misinformed by the conductor of the train as to the station at which he should alight; in consequence of which he got off at a station twelve miles from his destination, to which he was forced to drive in a carriage on a cold night. In an action against the railroad, plaintiff obtained a verdict of $150, the jury specifying that $25 of this was for loss of time and $5 for the hire of the carriage.

The Appellate Court of Indiana was of the opinion that the remaining $120 was an excessive compensation to plaintiff for a three hours' drive and the postponement of his supper until eleven o'clock at night; accordingly a new trial was ordered.

EMINENT DOMAIN.

Damages to Distant Property

The Supreme Court of Pennsylvania has again applied the rule that, under Art. XVI, § 8, of the Constitution of Pennsylvania, providing for the recovery of consequential damages when land is taken under the power of eminent domain, the damages are not restricted to compensation for injuries to abutting properties: *Chatham St.*, 43 Atl. 365. Therefore, when the grade of a street was changed under the Act of May 16, 1891, damages were allowed to be recovered by an owner of lots, which did not front on the street, but which drained into the street through connecting alleys, and whose drainage was rendered impossible by the change of grade, save at great expense. The cases of *Mellor* v. *Phila.*, 160 Pa. 614, *Melon St.*, 182 Pa. 397, and *Snyder* v. *Lancaster*, 20 W. N. C. 185, were cited on this point.

Right of Action for Damages, To whom it Descends

A, the owner of land, through which the B railroad company had constructed its road under the power of eminent domain, died without having instituted proceedings to recover damages. The question arose whether the right to recover damages vested in the personal representative or the heir. The Supreme Court of Indiana properly held that, since the road had been actually constructed during the life of the decedent, the claim against the railroad became a mere chose in action, which should be enforced by the personal representative: *I. & V. R. Co.* v. *Price*, 53 N. E. 1018. But it should be remembered that if the road had been merely located during the life of the decedent, and the actual construction not started until after his death, the injury would be done to the land, and the heir would have the right to recover damages therefor.

Consequential Damages Arising from the Taking of Land

The sewerage commissioners of Massachusetts constructed a sewer through the land of the petitioner, by virtue of Stat. 1890, c. 270, which provided, *inter alia*, that the commonwealth "shall pay all damages that shall be sustained by any person or corporation by reason of any such taking." In a proceeding by the petitioner to recover damages, under the statute, for injury to the remainder of his land, caused by the drainage of his wells by the sewer, it was strongly contended on behalf of the commonwealth that the taking, for which it was liable, was limited to the acquisition of a title to the land

EMINENT DOMAIN (Continued).

or easement taken, and that for any other damage caused by the construction of the sewer to the remaining premises, the remedy of the petitioner, if he had any, was by an action at law.

The Supreme Court of Massachusetts held that the statute was broad enough to cover both damages caused by the direct taking, and the consequential damages arising therefrom; therefore, since the defendant would have been liable at common law for the diversion of the water from the petitioner's wells, this was a consequential injury within the terms of the statute, and recovery could be had in the proceedings thereunder. The case of *Bacon* v. *Boston*, 154 Mass. 100, which arose under a statute providing that the city should make compensation "for such lands as it shall take under this act," was distinguished on the ground that the latter statute intended to provide only for damages arising from the direct taking: *Penney* v. *Comm.*, 53 N. E. 865.

EVIDENCE.

The case of *Debler* v. *State ex rel. Bierck*, 53 N. E. (Ind.) 850, decides several questions of evidence in relation to bastardy proceedings: (1) That it is proper to introduce evidence of the fact that at or about the time of the alleged sexual intercourse of the relatrix and the defendant, the relatrix had intercourse with other men, but the effect of such evidence is only to impeach the testimony of the relatrix; (2) Evidence is admissible to show that at the time of such intercourse the defendant was infected with a venereal disease and that the relatrix was not; (3) A statement of the relatrix that a certain man, other than the defendant, was not her "beau" any more, is inadmissible.

Bastardy Proceedings

HUSBAND AND WIFE.

The common law in relation to the powers of married women prevails in Massachusetts to a surprising extent. In *Bank* v. *Whicher*, 53 N. E. 1004, the defendant, a married woman, made a promissory note payable to her husband, by whom it was indorsed to the plaintiff. In an action on the note, it was held that the Massachusetts statutes in relation to married women

Note Made by Married Woman, Validity

HUSBAND AND WIFE (Continued).

had not given the defendant power to make the note, and it was therefore void; nor was the case changed by the fact that the note was delivered by the husband to the plaintiff in payment of a debt of the married woman to the plaintiff.

INSURANCE.

Construction of Words, "Good Health"

In *Barnes* v. *Fidelity Mut. Ins. Co.*, 43 Atl. 341, which was an action on a policy of life insurance, the question arose over the effect of the following representation in the application: "That I am in good health, and free from any and all diseases, sickness, ailments or complaints, trivial or otherwise."

At the time of the delivery of the policy and the payment of the first premium the insured was suffering from a severe cold, and he died of pneumonia six days afterwards. The trial judge left it to the jury to determine whether the condition of the insured was such as to bring him within the terms of the above representation. From a verdict in favor of the insured, the defendant appealed, and judgment was affirmed by the Supreme Court of Pennsylvania, Sterrett, C. J., saying: "As stated by a learned text writer, the term, 'good health,' does not mean absolute perfection, but is comparative. The insured need not be entirely free from infirmity or from all the ills to which the flesh is heir. If he enjoys such health and strength as to justify the reasonable belief that he is free from derangement of organic functions, or free from symptoms calculated to cause a reasonable apprehension of such derangement, and to ordinary observation and outward appearance his health is reasonably such that he may with ordinary safety be insured, and upon ordinary terms, the requirement of 'good health' is satisfied. Slight troubles, temporary and light illness, infrequent and light attacks of sickness, not of such a character as to produce bodily infirmity or serious impairment or derangement of vital organs, do not disprove the warranty of good health." Citing 3 Joyce, Insurance, § 2004.

Foreign Insurance Companies, Business in Pennsylvania

The Supreme Court of Pennsylvania has reiterated its decision in *Comm.* v. *Vrooman*, 164 Pa. 306, to the effect that a foreign insurance company, which has not complied with the provisions of the Act of April 4, 1873 (P. L. 20), authorizing insurance companies to transact business in Pennsylvania on the performance of certain conditions, cannot insure

INSURANCE (Continued).

property until the conditions have been complied with. Accordingly it was held (Mitchell, J., dissenting), that an Ohio insurance company, which had issued a policy to the owner of property in Pennsylvania before the certificate authorizing it to do business was issued, could not recover on premium notes made by the insured: *Swing* v. *Munson*, 43 Atl. 343.

MUNICIPAL CORPORATIONS.

Property Assessments for Sewers

The Supreme Court of Massachusetts has declared unconstitutional a statute directing the assessment of sewerage charges on property, on the ground that it forces the property owners to bear the whole cost of an improvement which is not a special benefit to them, but a general one to the municipality: *Sears* v. *Street Com'rs of Boston*, 53 N. E. 876.

The court cites and relies upon *Hammett* v. *Phila.*, 65 Pa. 146, *Washington Ave.*, 69 Pa. 352, *Williamsport's Appeal*, 41 Atl. (Pa.) 476, and *Erie* v. *Russell*, 148 Pa. 384, in which last case the Supreme Court of Pennsylvania said, "It [the sewer] was made by the action of the city as a part of its system of sewerage, which is as necessary for the health of its people as its paved streets are for their use . . . It is now a constituent of the general system ordained by the city for the convenience and health of its inhabitants. The system confers benefits which are general. It is a public necessity, and the expense of maintaining it should be provided for by general taxation."

NEGLIGENCE.

Ground on Public Street, Barbed Wire Fence

It is now becoming common for a property owner, whose property is situated at the corner of two intersecting streets, and whose house does not extend to the line of either street, to keep a grass plot extending around the house on each side, and, in order to prevent passers-by from making a short cut across the grass plot, to stretch a wire fence diagonally from the corner of the house to the corner of the two streets, leaving the outer edges of the grass plot without any fence or other obstruction.

In *Quigley* v. *Clough*, 53 N. E. 884, the defendant had constructed a diagonal fence of barbed wire, against which the plaintiff walked, on a dark night, and was injured. The Supreme Court of Massachusetts held that there could be no

NEGLIGENCE (Continued).

recovery, on the ground that the plaintiff was a trespasser, and the defendant was not guilty of actual malice.

While the decision is doubtless correct, it is certainly unfortunate, since the practice of putting a barbed wire fence in such a position is highly objectionable. On a dark night it is hardly possible for a pedestrian to tell when he has overstepped an imaginary line, the consequence of which is to make him a technical trespasser, and the position in which the fence is placed, virtually makes it amount to a man-trap under such circumstances. The subject is one which should be brought before the consideration of the municipal authorities.

Duty of Municipality to Free its Sidewalks from Snow

The Court of Appeals of New York has decided (Martin, Bartlett and Vaun, JJ., dissenting) that it is not negligence in a municipality to fail to remove the snow from sidewalks: *Liehtenstein* v. *Mayor, etc., of New York*, 54 N. E. 69. It appeared that prior to the accident in question, there had been heavy falls of snow, which the city had shoveled to each side of the sidewalks, forming large "banks," the sides of which had frozen over and become slippery. On the day of the accident, the warmth of the weather had caused a pool of water to form on the sidewalk, to avoid which plaintiff stepped on one of the banks and slipped, suffering an injury. Judgment for plaintiff was reversed on the ground that the formation of the "banks" and the accumulation of the water was only that which was to be expected under the circumstances, and that a decision against the city in such a case would practically amount to laying down the rule that the city was an insurer for the safe condition of its sidewalks.

"Stop, Look and Listen," Exception

In *Betts* v. *Lehigh Val. R. Co.*, 42 Atl. 362, the Supreme Court of Pennsylvania has applied one of the exceptions to the "stop, look and listen" rule, so strictly enforced in that state. It is that when a person comes to a railroad station to board a train, to approach which he is forced to cross an intervening track, he has a right to rely on a rule of the company that no train shall run on that intervening track while another train is receiving or discharging passengers at the station; therefore in such a case it is not contributory negligence *per se* for him to cross that track in violation of the "stop, look and listen" rule. In support of the exception the court cited *R. R.* v.

NEGLIGENCE (Continued).

White, 88 Pa. 327; *Kohler* v. *R. R.*, 135 Pa. 346; *Flanagan* v. *R. R.*, 181 Pa. 242; *Morgan* v. *R. R.*, 16 Atl. 353; *Warner* v. *R. R.*, 168 U. S. 339.

PARENT AND CHILD.

Who May Recover for Death of Child

The Appellate Court of Indiana has affirmed the doctrine that statutes giving a right of action for the death of human beings must be strictly construed in regard to the parties entitled thereunder. In *Citizens' Rwy. Co.* v. *Cooper*, 53 N. E. 1093, it appeared that a bastard child, for whose death the action was brought, had been reared and supported by the plaintiff since his birth, but was never legally adopted. In an action brought against a railroad to recover damages for his death, the court denied a recovery, on the ground that plaintiff was not a "parent" within the statute, likening her case to that of the mother of a bastard, or that of a man who marries a bastard's mother, neither of whom could sustain the action.

PLEADING AND PRACTICE.

Answer by Respondent in Divorce Cases

While only a dictum, the statement of Judge Morrison in *Oxley* v. *Oxley*, 43 Atl. 340, affirmed, *per curiam*, by the Supreme Court of Pennsylvania, will be of interest to attorneys in divorce cases: "We desire to call attention to the fact that the respondent did not file any answer, and yet he appeared before the examiner with his counsel, cross-examined the libellant's witnesses, and testified on his own behalf. This is not good practice. Under the law and rules of this court, if he desired to offer testimony he should have filed an answer raising an issue; and this is so, whether he desired an issue to be tried by the court or by a jury."

PROPERTY.

Claim Against the Government, Nature, Liability to Creditors

One P, who was an officer in the service of the United States, advanced to his successor, out of his own funds, a large sum of money for the use of the government. The money was so used, and by Act of Congress, February 23, 1891 (26 Stat. 1371), it was provided that the money should be repaid to "P and his heirs." Before the money was paid

PROPERTY (Continued).

P died, and the payment of the money to P's heirs was disputed by his creditors.

The Supreme Court of the United States held that the proper construction of the statute showed that Congress did not intend to confer a mere gratuity on P, but it was a recognition of a moral and equitable, if not legal obligation to restore him the money; that the word "heirs" in this connection was equivalent to the words "personal representatives," and the money, being merely personal property, like any other claim, was payable to P's creditors, to the exclusion of his heirs: *Price* v. *Forrest*, 19 Sup. Ct. 434.